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No. 82-966

In the Supreme Court of the United States

October Term, 1982

HELEN WEST,
Petitioner,
vs.
ROADWAY EXPRESS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONER

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While conceding that the issue of due process was timely and fully raised in the Supreme Court of Ohio, respondent maintains that petitioner did not raise the issues of equal protection or privileges and immunities in that court. Also, recognizing that due process is violated if the decision below is arbitrary and capricious, respondent challenges petitioner's contention that the Court of Appeals held that Mrs. West, despite more than twenty years of continuous employment at Roadway, "had neither an express nor an implied contract of employment." Finally, respondent argues that petitioner is attempting to create a "federal doctrine of tenured employment." Because these essentially new matters distort both the issues and the course of proceedings below, a reply is required.

ARGUMENT

A. THE ISSUES OF THE DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO THE EQUAL PROTECTION OF THE LAWS AND THE ABRIDGEMENT OF HER FUNDAMENTAL RIGHT, PRIVILEGE, OR IMMUNITY TO MAKE AND ENFORCE AN EMPLOYMENT CONTRACT WERE DRAWN IN ISSUE BEFORE THE SUPREME COURT OF OHIO.

Respondent argues that petitioner in the Supreme Court of Ohio did not draw in issue her claims of a denial of equal protection or an abridgement of her privileges and immunities by the Ohio Ninth District Court of Appeals. In support of its contention that the Court lacks jurisdiction of these claims, respondent has appended to its Brief a copy of Mrs. West's argument as appellant in the Supreme Court of Ohio.

Rule V of the Rules of Practice of the Supreme Court of Ohio provides that the appellant must attach an appendix to her Memorandum in Support of Claimed Jurisdiction setting forth "a copy of any statute or constitutional provision relied upon, to be construed or otherwise involved in the case." A statement of the Clerk of the Supreme Court of Ohio is filed with this Brief showing the United States constitutional provisions relied upon by Mrs. West in the Supreme Court of Ohio. As will be seen, petitioner expressly set out the Privileges or Immunities, the Due Process, and the Equal Protection Clauses in the appendix, to be considered by the Supreme Court of Ohio in determining whether a substantial constitutional question existed (Addendum, pp. A1-A2).

Not only were the Privileges or Immunities and the Equal Protection Clauses specifically drawn to the attention of the Supreme Court of Ohio, but references were made to the substance of these claims in petitioner's argument. Mrs. West argued that the Court of Appeals had expressly found she had no contract of employment, thus cutting her off "from all rights arising through her employment." (Appendix to Respondent's Brief A7). She asserted that "[t]he right of an employee to contract for his labor . . . is a fundamental and vital constitutional right. . . ." (Appendix to Respondent's Brief A11). To draw in issue the violation of a provision of the United States Constitution:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. *New York, ex rel., Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)

Petitioner claimed that the State of Ohio had impaired her employment contract (Appendix to Respondent's Brief A11 to A13, A15). Accordingly, the issue of the abridgement of the fundamental right to contract employment was drawn in question with "clear intendment" in the Supreme Court of Ohio. *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954).

Claiming a denial of equal protection by the Court of Appeals, Mrs. West argued in the Supreme Court of Ohio that her employment arose out of contract, express or implied (Appendix to Respondent's Brief A1 to A3); that

she and "other middle-level managerial employees at Roadway" were excluded from the benefits of union membership (Appendix to Respondent's Brief A13); and that the Court of Appeals' decision affected every management-level employee in Ohio who was not "low enough to belong to a labor union" (Appendix to Respondent's Brief A15 to A16). These statements timely called to the attention of the Supreme Court of Ohio with fair precision petitioner's claim that the decision of the Court of Appeals denied her—and will deny other nonunion employees who are not corporate officers—the equal protection of the laws.

B. THE DECISION BELOW HELD THAT PETITIONER WAS NOT EMPLOYED UNDER EITHER AN EXPRESS OR AN IMPLIED CONTRACT OF EMPLOYMENT.

Although respondent argues the decision below held only that petitioner's evidence was insufficient to establish a contract of definite duration, a careful reading of the opinion of the Court of Appeals reveals that the court, misinterpreting Ohio law, expressly found that Mrs. West was not employed under either an express or an implied contract of employment. (If the decision of the Court of Appeals had been based on the weight of the evidence, the court would have been required under Ohio law to remand the case for a new trial. *Hanna v. Wagner*, 39 Ohio St. 2d 64, 313 N.E.2d 842 (1974)).

In holding that Mrs. West had no employment contract and, thus, could not bring an action for breach of contract, the Court of Appeals, even though she had been employed by respondent for over 20 years, held: "It is clear from the record that there never was an express contract,

written or oral, between plaintiff and Roadway."[1] (Appendix to Petition A8). After reviewing the documentary evidence, the Court of Appeals concluded "that plaintiff's employment was for an indefinite period and as such was terminable at the will of either plaintiff or Roadway. . . ." (Appendix to Petition A11). In explaining its decision, the Court of Appeals noted:

> The general rule, and that followed in Ohio, is that unless an employment contract specifically obligates *both the employer and the employee for a definite term of employment,* the employment is considered to be terminable at the will of either party. . . . (Appendix to Petition A15) (Emphasis added).

Finally, the court, in holding that Mrs. West could have no action against her superiors for interference with her contract relationship with Roadway, explained:

> As we have previously stated in our discussion of the Roadway appeal, *plaintiff had neither an express nor an implied contract of employment.* Thus, plaintiff can have no cause of action for "interference with a contractual relationship." However, a cause of action is cognizable for interference with an employment relationship, even absent a contract. (Appendix to Petition A25) (Emphasis added).

Conceding that Roadway, in fact, had promised Mrs. West that she would not be discharged except for just cause—as found by the jury—the Court of Appeals considered only whether Mrs. West had been offered *and*

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1. Obviously, Mrs. West was employed under an express contract of employment; otherwise, she would not have been entitled to enforce Roadway's obligations for salary, pension, or other employee benefits. Although the contract was express, some of its terms, for example, whether she could only be discharged for just cause, were implied from documents and company employment practices and policies.

she had promised to accept employment with Roadway for a definite time. The Court of Appeals concluded that in the absence of *reciprocal* promises to employ and to work for a fixed and definite period the agreement fails for definiteness and is "illusory", citing as authority (Appendix to Petition A7) Annot., 60 A.L.R.3d 226, 232 (1974), quoted by respondent in its Brief at page 5. Thus, Mrs. West, solely on the strength of a parenthetical statement from 60 A.L.R.3d having no basis in Ohio law, was relegated to the status of a "non-contract" employee who has no contractual rights against her employer. Until this decision, no Ohio case had held that an employer's promise to its employee that he or she would not be dismissed except for just cause is not an enforceable contractual obligation.

C. PETITIONER IS NOT ATTEMPTING TO ERECT A FEDERAL CONSTITUTIONAL DOCTRINE OF TENURE IN EMPLOYMENT RELATIONSHIPS.

Free labor must be based on contract. There is, or should be, a fundamental, federal constitutional right to contract employment. *Butchers' Union Slaughter-House and Live Stock Landing Co. v. Crescent City Live Stock Landing and Slaughter-House Co.*, 111 U.S. 746 (1884), concurring opinion of Bradley, J., 762; *Allgeyer v. Louisiana*, 165 U.S. 578, 589-590 (1897); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 536 (1922). Petitioner is not attempting to create a federal constitutional doctrine of tenured employment. Quite the contrary. An employer and employee should be free to contract the terms and conditions of employment free from judicial intervention. If an employer has not promised, either expressly and impliedly, that its employee will not be dismissed without

just cause, then the employee may be terminated at will. But if the employer promises its employee that she will be discharged only for just cause after successfully completing a probationary period, even though the term of employment is indefinite, then the employer's promise should be enforced.

The decision below held that Roadway's promise of assured employment until mandatory retirement, terminable only for just cause—as determined by a jury—could not be enforced because Mrs. West's employment was not based on contract, express or implied. It was the Ohio Ninth District Court of Appeals and the Supreme Court of Ohio which interfered with the contract relationship between Mrs. West and Roadway. Such intervention by Ohio through its judiciary deprived Mrs. West of her substantive due process right of freedom of contract, denied her the equal protection of the laws, and abridged her fundamental right as an American citizen to contract employment.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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A1

ADDENDUM

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February 4, 1983

John L. Wolfe
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Re: West v. Roadway Express, Inc.,
Case No. 82-910

Dear Mr. Wolfe:

I wish to acknowledge your recent letter concerning the memorandum in support of jurisdiction filed by the plaintiff-appellant in the above captioned case in this Court.

I have examined that memorandum in support of jurisdiction and pursuant to the examination, state that the enclosed copy of certain provision of the Constitution of the United States was included as page 70 and was a part of the appendix to the memorandum.

I hope the above statement will be of assistance to you.

Very truly yours,

James Wm. Kelly

JWK:bw

Excerpt From Memorandum in Support of Claimed Jurisdiction Filed by Helen West in the Supreme Court of Ohio

[page 70]

CONSTITUTION OF THE UNITED STATES

ARTICLE I, §10

Section 10. No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.